SUPREME COURT, U.S.
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No. 94-1658

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION,
Petitioners,

v.

DETREX CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER QUESTION PRESENTED FOR REVIEW

Whether the application of this Court's controlling decision in *Key Tronic Corp. v. United States,* 511 U.S. ——, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994), which was decided while this non-final case was on appeal, violated the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 through 9675 or the common law doctrine of collateral estoppel where Respondent had not exhausted its appellate remedies concerning the quantification of attorneys fees?

THE PARTIES

Respondent, Detrex Corporation, is a Michigan corporation. Detrex Corporation owns 100% of The Elco Corporation, an Ohio corporation, which in turn owns 85% of Harvel Plastics, Inc., a Pennsylvania corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

INTRODUCTION

There are no special or important reasons for granting Petitioners' request for writ of certiorari. The issues presented do not involve a conflict of authority in the lower courts. The decision below was based upon a narrow set of procedural facts unlikely to significantly impact future litigation.

Moreover, the decision of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") was correct. After this case was remanded to the District Court, two new, final judgments were entered which quantified an award of attorneys fees for the first time. Respondent, Detrex Corporation ("Detrex"), appealed from these two new decisions as of right. During the

pendency of Detrex's appeal, this Court decided *Key Tronic Corp. v. United States*, 511 U.S. ——, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994). Thus, there was no preclusive doctrine which warranted refusing to apply *Key Tronic* to the then pending appeal. There was no final judgment on which to base collateral estoppel. The Seventh Circuit also correctly concluded that in the absence of a final judgment, its test for applying collateral estoppel under limited circumstances was not satisfied. The petition for writ of certiorari should be denied.

1. Recent Procedural History of the Case and the *Key Tronic* Decision.

This is the second time that this lawsuit has been brought before this Court. Earlier, Detrex filed a petition for a writ of certiorari based upon a decision of the Seventh Circuit which affirmed in part, reversed in part, and remanded for further proceedings ("first opinion"). Petitioners' Petition for Writ of Certiorari ("Petition for Writ") at 39a-48a. The first opinion confirmed Detrex's liability under one section of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 through 9675 ("CERCLA"), however, it was silent with respect to the attorneys fees issue. Detrex's petition for writ of certiorari was denied. See 114 S.Ct. 691 (1994).

The case then returned to the District Court following issuance of the mandate by the Seventh Circuit on January 24, 1994. The litigants filed motions in the District Court evidencing their different interpretations of the mandate of the Seventh Circuit. Petitioners filed a motion to technically amend the District Court's prior judgment. Detrex filed a more comprehensive motion which was styled "Motion for Determination of Further Proceedings Ordered by the Seventh Circuit, For a Stay, For Reconsideration of its Motion for Consolidation, and Reply Brief in Opposition to Plaintiffs' Request to Tech-

nically Amend the Judgment." The District Court addressed these two motions in a Memorandum and Order dated March 28, 1994. Respondent's Appendix at 1a-7a. Petitioners' motion was granted by the District Court. Based upon the mandate of the Seventh Circuit, a new and amended judgment was entered on April 4, 1994, which awarded Petitioners response costs including attorneys fees and litigation expenses. Respondent's Appendix at 8a-9a. With respect to the attorneys fees issue, the District Court advised that "[s]hould the Supreme Court disagree with this court's holding, Detrex can move at that time for the appropriate relief." Respondent's Appendix at 5a.

In response to the District Court's judgment awarding them attorneys fees, the Petitioners filed an Application for Attorneys Fees, Litigation Expenses, and Pre-Judgment Interest. On March 30, 1994, the District Court entered a second Memorandum and Order which, for the first time, quantified the attorneys fees and litigation expenses that Petitioners were entitled to receive. Petition for Writ at 10a-36a. A final judgment was entered on March 31, 1994, awarding Petitioners $554,494.71 in attorneys fees and litigation expenses. Petition for Writ at 35a.

It was these two new judgments which Detrex appealed to the Seventh Circuit. Detrex filed its Notice of Appeal on May 2, 1994, with respect to both the March 31, 1994, and April 4, 1994, judgments. The argument made by Detrex on appeal was that the judgments were in error to the extent that they awarded and quantified attorneys fees and litigation expenses.

Approximately one month later, while Detrex's appeal was pending, on June 6, 1994, this Court decided *Key Tronic*. In *Key Tronic*, this Court held that § 9607 of CERCLA does not generally permit the recovery of attorneys fees and litigation expenses. Certain limited clas-

sifications of attorneys fees, however, are recompensable to private litigants under CERCLA. For example, attorneys fees closely tied to "the actual cleanup" may be recovered. *Key Tronic*, 128 L.Ed.2d at 807. This controlling decision, issued during the pendency of Detrex's appeal, rendered the judgments of the District Court incorrect.

Petitioners also filed a Supplemental Application for Attorneys Fees, Litigation Expenses, Pre-Judgment Interest, and Additional Response Costs. On June 15, 1994, the District Court entered two Memoranda and Orders addressing Petitioners' application for recovery of more attorneys fees and prejudgment interest. The District Court denied the motions of the Petitioners based upon the rule of law created by the *Key Tronic* decision. Respondent's Appendix at 10a-12a. Thus, both the District Court and the Seventh Circuit have applied this Court's decision in *Key Tronic* to this case and denied Petitioners' repeated attempts to recover attorneys fees.

2. The Decisions of the Seventh Circuit.

The Seventh Circuit has twice confirmed that *Key Tronic* is controlling in this litigation. While Detrex's appeal was pending, but before it had been briefed, Petitioners filed a Motion to Dismiss this Appeal on Issues Concerning the National Contingency Plan and Recovery of Attorney Fees, Litigation Expenses, and Indirect Expenses as Response Costs. The Seventh Circuit decided Petitioners' motion in an Order dated August 5, 1994. Petition for Writ at 37a-38a. Concerning the attorneys fees issue, the Seventh Circuit held that "an intervening Supreme Court decision has strengthened Detrex's argument that it is not liable for attorneys' fees . . .". *Id.* at 38a. Thus, Detrex's appeal was allowed to continue based upon the Seventh Circuit's holding that *Key Tronic* was applicable to this litigation.

After briefing was completed, and without oral argument, the Seventh Circuit issued its opinion on January 10, 1995. Petition for Writ at 1a-9a. Detrex's appeal was granted and the District Court's judgments awarding and quantifying attorneys fees were reversed. *Id.* at 9a. Also, Detrex was awarded its costs incurred in connection with successfully prosecuting the appeal.

The core argument raised by Petitioners in their petition for writ of certiorari was also raised below and succinctly summarized by the Seventh Circuit, *i.e.*, "[Petitioners] ask us to hold that when we affirmed the relevant portions of the declaratory judgment, and the Supreme Court denied certiorari, the judgment became 'final' for purposes of res judicata." *Id.* at 2a. In framing its opinion, the Seventh Circuit reached some preliminary conclusions. It described Petitioners' argument concerning this Court's denial of Detrex's petition for a writ of certiorari as "a red herring." *Id.* at 3a. The Seventh Circuit also concluded that Petitioners argued for the application of "collateral estoppel rather than res judicata . . .". *Id.* at 4a-5a.

The majority of the Seventh Circuit's opinion concerned the issue as to whether there was a final judgment to permit the application of the doctrine of collateral estoppel. Additionally, the related issue was whether the absence of such finality could be overlooked based upon authority which applied collateral estoppel even without a final judgment. The Seventh Circuit answered both of these questions negatively and held that collateral estoppel was inapplicable.

With respect to the first issue, it was held by the Seventh Circuit that there was no final judgment. The Seventh Circuit explained that its mandate resulted in a "new, final judgment from which Detrex could have appealed and in fact did appeal." Petition for Writ at 6a. Declaratory judgments which award attorneys fees in un-

determined amounts, according to the Seventh Circuit, should likely not be treated as final and appealable. *Id* at 6a. Stated differently, there was no final judgment for collateral estoppel purposes because the order awarding attorneys fees to Petitioners was non-final until the amount of fees was determined and ordered paid. The appellate court wrote that that circumstance did not happen until March of 1994. *Id.* After careful consideration, the Seventh Circuit held that "there was no final judgment." *Id.* at 7a.

The Seventh Circuit then analyzed whether, notwithstanding the fact that there was no final judgment, collateral estoppel should be applied to Detrex's appeal. It was held that the preclusive doctrine was inapplicable because Detrex had not exhausted its appellate remedies. Detrex, according to the Seventh Circuit, could have requested and obtained relief from the non-final decision of the appellate court, *i.e.*, the first opinion. *Id.* This Court's policy of applying "new decisions to all cases that were not yet final when the new decision came down" was cited to by the Seventh Circuit. *Id.* at 7a-8a. The Seventh Circuit held that collateral estoppel should not be used to deprive Detrex of its full appellate remedies. In conclusion, the appellate court wrote:

> "[u]ntil our ruling on the scope of response costs became final, Detrex was entitled to pursue its appellate remedies, and hence to obtain the benefit of a favorable decision by the Supreme Court rendered before the pursuit was complete." *Id.* at 9a.

The thoughtful opinion by Chief Judge Posner considered and rejected the same arguments raised in the Petition for Writ. The Seventh Circuit did not erroneously ignore the position of Petitioners concerning 42 U.S.C. § 9613(g)(2). Petition for Writ at 6. Paraphrasing from the Seventh Circuit's August 5, 1994, order: it is true that the Seventh Circuit's opinion does not expressly mention 42 U.S.C. § 9613(g)(2), however, in upholding Detrex's appeal, it necessarily rejected every ground on which Petitioners opposed that appeal. Petition for Writ at 38a.

The Petitioners complain that it would be "unfair" to deny them recovery of attorneys fees. There is nothing "unfair" about denying Petitioners attorneys fees because this Court held that such costs are not recoverable under CERCLA.

REASONS FOR DENYING THE WRIT

I. PETITIONERS HAVE FAILED TO DEMONSTRATE WHY THE PETITION FOR WRIT SHOULD BE GRANTED.

A petition for writ of certiorari should explain to this Court the important reasons why review should be granted. Petitioners fail to make the required showing. They attempt to argue that this case presents an important question of federal statutory law. The decision of the Seventh Circuit, according to Petitioners, renders meaningless a "key" provision of CERCLA. Petition for Writ at 9-10. Also, Petitioners urge that the Seventh Circuit "misapplied" United States Supreme Court precedent. Petition for Writ at 10. No other reasons are offered in support of the Petition for Writ. The balance of the Petition for Writ makes the same legal arguments which were considered and rejected by the Seventh Circuit.

The Petition for Writ makes two legal arguments. Petitioners argue that § 9613(g)(2) of CERCLA makes the declaratory judgment concerning attorneys fees binding because there was an earlier appeal by Detrex. CERCLA, according to the Petitioners, "precludes a defendant found liable for response costs from relitigating the plaintiff's entitlement to recover [them] in subsequent proceedings brought to recover further response costs." Petition for Writ at 12. This position ignores the unique procedural facts of this litigation.

Additionally, Petitioners assert that *Key Tronic* cannot be applied to this case because *res judicata* applies. Petition for Writ at 16-17. The Seventh Circuit erred, according to the Petitioners, because the magical declaratory

judgment is *res judicata* or collateral estoppel, which negates the application of *Key Tronic*.

II. THIS CASE DOES NOT MERIT THE COURT'S REVIEW.

Rule 10 of the United States Supreme Court Rules explains the reasons why petitions for writ will be granted. There must be "special and important reasons therefore." Such special and important reasons include a conflict among the United States courts of appeals or an important question of federal law.

No such special and important reasons exist in this case. The Petitioners have not alleged a circuit court conflict concerning any issue. There is none. Nor is there an important question of federal law. This case is unique because of its procedural posture. If allowed to stand, the decisions of the Seventh Circuit will very likely have little impact upon future litigants. These unique procedural factors include a denial of Detrex's petition for writ of certiorari, remand back to the District Court, the intervening *Key Tronic* decision, the issuance of new judgments by the trial court, and subsequent appeal to the Seventh Circuit. Based upon Detrex's right to obtain relief under *Key Tronic* and the particular status of the litigation, the Seventh Circuit held that collateral estoppel was inapplicable. This hardly seems the type of case with far reaching impact that deserves employment of the scarce judicial resources of this Court.

If the CERCLA provision at issue was so "key", it can be assumed with some confidence that there would be a body of law interpreting it which the Petitioners surely would have cited to in their Petition for Writ. The reality is that the Petition for Writ is important to only the Petitioners in their attempt to recover attorneys fees despite law to the contrary from this Court and the Seventh Circuit. In any event, § 9613(g)(2) of CERCLA could also soon be amended by Congress.

III. THE DECISION OF THE SEVENTH CIRCUIT IS CORRECT.

A. Petitioners Have Misconstrued § 9613(g)(2) of CERCLA.

Detrex agrees that 42 U.S.C. § 9613(g)(2) is not ambiguous. This section of the statute does not, however, lead to the absurd result urged by Petitioners. Essentially, the Petitioners argue that, once a declaratory judgment issues, it is binding in *all* circumstances, for all issues in all cases, and without regard to subsequent procedural developments such as those in this case. The Petitioners' position is untenable. If, for example: a declaratory judgment were issued against a litigant with respect to its liability under CERCLA, such as happened in this lawsuit to Detrex; the liability issue is then lost in an interlocutory appeal; and later, in the same action, further facts were developed which established that the same litigant was not liable under CERCLA during the damages phase of the litigation. The Petitioners' interpretation of the statute would not allow for the declaratory judgment to be corrected to comport with the facts. Such a result could not have been intended by Congress.

Also, the argument of Petitioners ignores the facts of this case. The assertion of the Petitioners is that once this Court denied Detrex's petition for a writ of certiorari, "appellate review of the declaratory judgment . . . ended". Petition for Writ at 5. The Petitioners, however, conveniently fail to mention the relevant procedural history after the first opinion was issued by the Seventh Circuit. After denial of Detrex's petition for a writ of certiorari, the mandate of the Seventh Circuit issued and the case was once again within the jurisdiction of the District Court. The parties filed motions. The District Court issued two new judgments both of which concerned attorneys fees. The amount of attorneys fees were quantified for the first time and ordered to be paid. New orders

were also issued which denied Petitioners' requests for additional attorneys fees and interest based upon the *Key Tronic* decision. Respondent's Appendix at 10a-12a.

The Seventh Circuit correctly rejected the position of the Petitioners. Detrex could have, and did, appeal the new, final judgments as of right. Petition for Writ at 6a. After careful analysis, the appellate court concluded that its earlier opinion was not final with respect to the attorneys fees issue. Nor was there any decision "final enough" to justify the application of collateral estoppel because Detrex had not exhausted its appellate remedies.

The Petitioners misinterpret § 9613(g)(2) of CERCLA arguing that it means "once an entitlement to response costs or damages is established, that determination is binding in all future actions to recover further response costs or damages." Petition for Writ at 11. The statute, on its face, has a different meaning. Section 9613(g)(2) states that a declaratory judgment shall be entered "on liability." Thus, with respect to the issue of liability under CERCLA, the declaratory judgment is binding in subsequent actions. The statute does not compel the result argued for by Petitioners that the *amount or categories* of response costs are fixed for all time. The last phrase of this provision supports this interpretation because it refers to "*subsequent action or actions* to recover *further* response costs or damages." 42 U.S.C. § 9613(g)(2) (emphasis added). This section has application to the issue of liability in a subsequent action, not the same lawsuit. The use of the word "further" by Congress is also instructive. Clearly, Congress was addressing a situation where a second or third lawsuit had been filed seeking additional or "further" response costs. In such a second or third lawsuit, an earlier declaratory judgment on liability would be binding.

That is how Congress intended for this provision to be applied. The judgment declaring that a party is liable

under CERCLA has prospective application; however, nothing on the face of the statute dictates that amounts or categories of response costs are binding in subsequent actions. Congress did not mean to prevent the application of controlling authority to a pending appeal. Petitioners' suggestion to the contrary is wrong.

The Petitioners' initially argue that § 9613(g)(2) is unambiguous. In the same breath, however, they urge the Court to consider the provision's legislative history. Detrex suggests that the Petitioners are grasping at straws because of the weakness of their arguments.

Nonetheless, a review of the legislative history confirms that Detrex's interpretation of § 9613(g)(2) is correct and not that of the Petitioners. The legislative history cited to by Petitioners does not expressly or implicitly negate application of *Key Tronic* to this case. The Petitioners agree that the legislative history contemplates multiple lawsuits. Petition for Writ at 13. They also concur that the initial declaratory judgment on liability will be binding in those subsequent cases. *Id.* Their analysis, however, stops there. The legislative history supports only the conclusion that judgments be declared on liability under CERCLA for purposes of future litigation. The legislative history of CERCLA contains this language which supports Detrex's interpretation of § 9613(g)(2):

> "[i]n the initial cost recovery action, in order to conserve judicial time and resources, the court is to enter a declaratory judgment on liability for response costs; this judgment will be binding in future cost recovery actions to obtain additional costs." SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, S. PRT. 101-120, Vol. 5, 101st Cong., 2d Sess. 4058 (1990).

The interpretation of the legislative history suggested by Petitioners is also not consistent with CERCLA litigation. Litigation under CERCLA usually proceeds in

two distinct phases, *i.e.*, liability and damages. In the initial phase, the liability of the litigants under CERCLA is determined. Trial courts assess whether the defendants are liable under CERCLA's strict liability scheme. It is that declaration of liability which Congress intended to have application in subsequent actions without regard for the actual amount or categories of response costs.

A major flaw in Petitioners' position is that the amount of Detrex's liability for attorneys fees was not fixed until March of 1994. The declaratory judgment concerning attorneys fees was not final until that quantification was made and payment ordered. See Petition for Writ at 6a. Detrex appealed after the attorneys fees were quantified and, during the pendency of that appeal, the *Key Tronic* decision was issued. Thus, the Seventh Circuit was correct in applying the controlling decision to Detrex's appeal. The Seventh Circuit did not ignore the District Court's declaration of liability under CERCLA. It merely applied *Key Tronic* to Detrex's appeal which was based upon new, final judgments that quantified attorneys fees for the first time. One category of response costs was removed from Petitioners' damages and the declaration of liability was not negated by the Seventh Circuit.

B. Neither Collateral Estoppel Nor Procedural Requirements Barred the Application of *Key Tronic* to Detrex's Appeal.

The Petitioners assert that the Seventh Circuit erred by applying *Key Tronic* "retroactively." This argument can be quickly dispatched. This Court's decisions in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 111 S.Ct. 2439, 2445 (1991) and *Harper v. Virginia Dept. of Taxation*, —— U.S. ——, 113 S.Ct. 2510, 2517 (1993) are cited by Petitioners in support of their argument. Under the authority of those cases, however, new decisions of the Court are applied retroactively *unless* procedural requirements or *res judicata* prevent such ap-

plication. The *Key Tronic* decision was properly applied to Detrex's pending appeal by the Seventh Circuit.

The issue is whether there are any procedural requirements or *res judicata* considerations which bar the application of *Key Tronic*. There are none. As explained by the Seventh Circuit, there was no final judgment upon which to base collateral estoppel because Detrex appealed from two new final judgments. Nor was there any judgment "final enough" to justify the application of collateral estoppel because Detrex had not exhausted its appellate remedies. Thus, the exception to the general rule of retroactive application is inapplicable.

The Seventh Circuit explained that its first opinion (Petition for Writ at 39a-48a) was non-final "in the eyes of the Supreme Court." Petition for Writ at 7a. Detrex could have sought and obtained relief directly from this Court with respect to the non-final portion of the Seventh Circuit's first opinion. *Id.* Interestingly, the Seventh Circuit cites to the *Harper* decision in this regard which is also relied upon by the Petitioners.

The correctness of the Seventh Circuit's decision on this issue is confirmed by a recent order of this Court. In *Donahey v. Bogle*, 987 F.2d 1250 (6th Cir. 1993), the trial court refused to award attorneys fees based upon the American Rule. The United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") reversed on this issue and "remanded for determination of what constitutes reasonable attorneys fees recoverable under CERCLA." *Id.* at 1256. On June 13, 1994, this Court granted the petition for writ of certiorari in the *Donahey* case. *Livingston v. Donahey*, 114 S.Ct. 2668, 129 L.Ed.2d 805 (1994). The judgment of the Sixth Circuit was vacated and the case was remanded by this Court for further consideration in light of *Key Tronic*. The Seventh Circuit correctly held that Detrex was entitled to relief based upon *Key Tronic*. The arguments of Petitioners are unpersuasive and contrary to well established authority.

CONCLUSION

The Petitioners' Petition for Writ should be denied. This case does not merit consideration by the Court. The narrow decision of the Seventh Circuit was correct because Detrex was entitled to have *Key Tronic* applied to its appeal.

Respectfully submitted,

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